No. 82-314

In the Supreme Court of the United States

OCTOBER TERM, 1982

CARVALL BROS. FOREST PRODUCTS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Claims correctly concluded, on the basis of express language in a prospectus and a timber sales contract, petitioner's prior experience, and industry practice, that a Forest Service estimate of timber volume did not constitute a contractual warranty of volume.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-214

CAFFALL BROS. FOREST PRODUCTS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. A1-A43) is reported at 678 F. 2d 1071. The findings of the trial judge (Pet. App. B1-B51) are not reported.

JURISDICTION

The judgment of the Court of Claims was entered on May 5, 1982. The petition for a writ of certiorari was filed on August 2, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATEMENT

1. Pursuant to 16 U.S.C. 535, the Secretary of Agriculture is authorized to finance the construction of national forest roads and trails by a number of methods, including allowing purchasers of federally-owned timber to construct roads in return for credits against the purchase price of the timber. 16 U.S.C. 535(2). Prior to the award of such a

timber sale contract, the Secretary, through the Forest Service, estimates the volume and quality of the timber to be cut in order to determine its fair market value. 16 U.S.C. 472a; 36 C.F.R. 223.4. Based on this appraisal process (commonly referred to as "cruising"), the Forest Service establishes a maximum "purchaser road credit" limit for the contract in question, and solicits bids. While Forest Service cruisers strive for accuracy in estimating timber volume in a given area, their conclusions are merely estimates, and variations of more than plus or minus 10% are not uncommon, with overestimates of timber volume occurring more frequently than underestimates (Pet. App. A9-A10, A25-A26).

2. In 1969, the Forest Service advertised a proposed timber sale (the Skogi sale) under which the purchaser would agree to cut all "included timber" on eight cutting units in Mt. Hood National Forest in Oregon (Pet. App. A5, A13). The advertisement advised prospective bidders that the area in question contained an estimated 13,300 thousand board feet (MBF) of timber for cutting and that applicable "purchaser road credits" would be a maximum of $264,764 (*id.* at A5-A6). The prospectus accompanying the sale advertisement stated that volume estimates were " 'made available with the understanding that costs and values shown are not estimates of a purchaser's own costs or recovery estimates' " and that therefore bidders are " 'urged to examine the timber sale area * * * and make their own cost and recovery estimates' " (*id.* at A7-A8).

Petitioner, a timber company with nearly 50 years' experience in the industry (Pet. App. A11), submitted a bid on the Skogi sale after conducting its own examination of the site and concluding, based upon its survey, that the cruise information "appeared reasonable" (*id.* at A12) and that the Forest Service's estimated volume of 13,300 MBF " 'would be there' " (*ibid.*). Petitioner was subsequently awarded the Skogi contract, which, in keeping with industry practice,

provided in part that " '[t]he estimated quantities stated * * * are not to be construed as guarantees or limitations of the timber volumes to be designated for cutting under the terms of this contract' " (Pet. App. B23). Following certain design changes in the proposed road that caused the Forest Service to increase the purchaser credit limit to $299,883, petitioner commenced construction (*id.* at A16 n.11, A17). The area covered by the contract, however, yielded less timber than the Forest Service's estimate had indicated, so that the final cutout volume from the Skogi sale was 3,514.17 MBF less than the government's estimate, or a shortfall of 26.4% (*id.* at A18).[1] Because of this underrun, petitioner was able to apply earned purchaser credits of only $226,929.55 to the purchase of timber pursuant to the contract, leaving it with earned credits of some $72,953 that could not be so applied (*id.* at A19). The Forest Service subsequently refused petitioner's request for either additional timber or payment of the sum represented by the unapplied credits, and this action followed (*id.* at A20).

3. In the Court of Claims, petitioner contended that the Forest Service, by stating a contract volume and coupling it with a specified purchaser credit limit, warranted the accuracy of its volume estimate. The Court of Claims flatly rejected that contention and adopted the trial judge's recommended decision in favor of the government. It found that the total estimated volumes had not been guaranteed (such warranties were expressly disclaimed, Pet. App. A7, A14-A15, A26) and that petitioner had been "told to rely upon, and in fact did rely in substantial part upon * * * its own investigation of the proposed Skogi sale" in deciding to

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[1]Pursuant to the terms of a "scaled sale" contract such as the one involved here, the purchaser pays a rate per unit of volume removed and thus is not affected by any shortfall except for its inability fully to utilize purchaser credits (Pet. App. B20, B25).

bid on the contract (*id.* at A23). The court noted that in cases such as this, "industry practice was plainly not to interpret Forest Service estimates of timber volume as guarantees," and found that petitioner's own experience had been that cruise estimates often resulted in substantial underruns (*id.* at A9, A26).[2] Under these circumstances, the court concluded, petitioner had assumed the risk that the timber volume might be insufficient to offset the purchaser credits it expected to earn against stumpage payments (*id.* at A28-A29). In addition, the court rejected petitioner's contention that 16 U.S.C. 535 and its implementing regulations required the government to furnish sufficient timber to amortize fully the cost of constructing the road (*id.* at A39-A42).

ARGUMENT

The Court of Claims' decision correctly applies settled legal principles to the particular facts of this case. The decision merely gives effect to plain contract language that disclaims any warranty of timber volume and limits the use of purchaser credit. Contrary to petitioner's assertion, the decision does not conflict with prior rulings of the Court of Claims, and it raises no issue warranting further review by this Court.

1. Petitioner contends (Pet. 7-10) that the Forest Service's refusal to provide compensation for the timber shortfall it experienced in performing the contract violates its right to just compensation under the Fifth Amendment. This contention is based on the premise that the Skogi

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[2]In this connection, the court noted (Pet. App. A25-A26) that in negotiations leading to the adoption of the most recent timber sales contract form used by the Forest Service, the Service "had rejected industry efforts to obtain a warranty of volume of plus or minus 10 per cent, and the industry in effect acquiesced insofar as sales such as this one * * * were concerned."

contract contained a warranty that the volume of timber to be cut would equal the government's estimate—a proposition that was explicitly rejected by both the trial judge and the Court of Claims. Based upon their review of the facts of the case, industry practice, and language in both the prospectus and the timber sale contract, both courts concluded that the contract did not guarantee a particular volume of lumber and that petitioner had assumed the risk of an underrun by relying in substantial part on the results of its own inspection of the timber site (Pet. App. A23, B18, B34).[3] This Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949). See *Rogers* v. *Lodge*, No. 80-2100 (July 1, 1982), slip op. 10. Since it is clear that the conclusions reached by both courts concerning the terms of the Skogi contract were amply supported by the record,[4] there is no basis for reviewing those findings.

2. Petitioner's suggestion (Pet. 11-12) that the result reached by the court below conflicts with Congress' intent in enacting 16 U.S.C. 535 is equally without merit. In 1975, Congress amended Section 535 to permit the transfer of "unused effective purchaser credit" from one timber sale to another in the same national forest. Pub. L. No. 94-154, 89 Stat. 823. In so doing, however, it expressly excluded from

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[3]Petitioner's study had consumed approximately six man-days of labor (Pet. App. A11).

[4]Significantly, petitioner has not challenged either court's conclusion (Pet. App. A26, B18) that, in light of industry practice and petitioner's own experience with cruise estimates resulting in underruns, petitioner could not reasonably have regarded the Forest Service's estimate as a guaranty of volume. Moreover, as previously noted (see pages 2-3, *supra*), both the prospectus and the contract itself contained express disclaimers concerning the volume estimates (Pet. App. A7-A8, A15).

the amendment's coverage the type of unused purchaser road credits held by petitioner here. See H.R. Rep. No. 94-656, 94th Cong., 1st Sess. 3-4 (1975).[5] Thus, Congress clearly has recognized that in certain instances timber purchasers may accumulate unused road credits that will not be fully offset against the purchase price—and has implicitly authorized that practice. Cf. *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978); *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974). Accordingly, the Forest Service's interpretation of Section 535 as not requiring full payment for road construction through purchaser credits in cases such as this one is fully consistent with legislative intent and is entitled to judicial deference.[6]

3. Petitioner contends (Pet. 13-18) that the Court of Claims' decision is inconsistent with prior decisions of that court involving timber sales warranty claims. Even if petitioner's assertion were correct, it would not warrant review by this Court. But there is, in fact, no conflict, because none of the decisions cited by petitioner establishes that Forest Service timber contracts such as the one at issue here give

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[5]The amendment covers only "effective purchaser credit," which Congress defined as "credit which does not exceed current contract value minus base rate value." H.R. Rep. No. 94-656, *supra*, at 3. Where, as here, construction credits may be applied, the unused credits are not "effective" for purposes of the 1975 amendment. See generally 36 C.F.R. 223.3(m).

[6]Petitioner's suggestion (Pet. 12-13) that the Skogi contract is unenforceable because it is unconscionable is simply without foundation. As the Court of Claims correctly observed (Pet. App. A37 n.21), the unconscionability doctrine is not meant to allow courts to redistribute risks allocated by differences in bargaining power, but rather to prevent "oppression and unfair surprise." U.C.C. § 2-302, Official Comment 1. Cf. *Fraass Surgical Mfg. Co.* v. *United States*, 571 F. 2d 34, 40 (Ct. Cl. 1978). The Court of Claims' finding that petitioner had ample opportunity to conduct its own examination of the proposed sale site and spent six man-days doing so unquestionably disposes of petitioner's argument that U.C.C. § 2-302 requires reversal.

rise to a warranty of volume.[7] To the contrary, in *Womack* v. *United States*, 389 F. 2d 793 (Ct. Cl. 1968), the Court of Claims observed that the government "is not required to be clairvoyant" in preparing and furnishing estimates in connection with timber sales, but must only "base [its] estimate on all relevant information that is reasonably available to it." *Id.* at 801. If, as here (Pet. App. A32-A33), there is no reason to conclude that the estimates in question have been prepared negligently or in bad faith, or are grossly or unreasonably inaccurate, the fact that a shortfall occurs does not give rise to a right to recover damages based on the underrun. 389 F. 2d at 802.[8] See also *Timber Investors, Inc.* v. *United States*, 587 F. 2d 472, 480, 485 (Ct. Cl. 1978).

Nor does the Court of Claims' decision in *Everett Plywood & Door Corp.* v. *United States*, 419 F. 2d 425 (Ct. Cl. 1969), conflict with its ruling in this case. Although in *Everett* the court concluded that a warranty of a certain quantity of timber was extended by the government to the plaintiff, the contract and related documents in that case stated without qualification or disclaimer that a specified total of merchantable timber would be cut on the sale. *Id.* at 430. Moreover, the court found that for various reasons it was not possible for a potential bidder to conduct an independent cruise of the site and therefore the Forest Service "must have assumed" that prospective bidders would have to rely upon the accuracy of the government's estimate. *Id.*

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[7] Petitioner concedes (Pet. 7) that *Clearwater Forest Industries, Inc.* v. *United States*, 650 F. 2d 233 (Ct. Cl. 1981), is clearly distinguishable from the instant case, since it involved a deficit sale, *i.e.*, a sale advertised by the government as not projected to have sufficient value to yield a normal profit as calculated under the Forest Service's appraisal system. *Id.* at 235.

[8] *Womack* involved a procurement contract rather than a government sale. 389 F. 2d at 796.

at 431.[9] Finally, *Timber Investors, Inc.* v. *United States, supra*, is not inconsistent with the decision below. In that case, the Court of Claims held only (587 F. 2d at 480) that the plaintiff had failed to prove that the estimates in question were "grossly or unreasonably inaccurate"—a standard that the court found not met in this case either (Pet. App. A32-A33).[10] Thus, none of the cases relied upon by petitioner is in conflict with the instant decision. See also *Webco Lumber, Inc.* v. *United States*, 677 F. 2d 860 (Ct. Cl. 1982), and Gregory Lumber Co. v. *United States*, No. 134-81C (Ct. Cl. June 4, 1982), in which the Court of Claims found no inconsistency between this case and any of its prior decisions.

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[9]A more recent Court of Claims decision, *Everett Plywood Corp.* v. *United States*, 651 F. 2d 723 (Ct. Cl. 1981), also cited by petitioner (Pet. 6), is inapposite. In that case, the Court of Claims held that a timber sale contract had effectively allocated to the government the risk of cancellation for environmental damages caused by construction of the proposed roads and that the government had not met its burden of proving a frustration of contract defense. 651 F. 2d at 731. No such question is presented here.

[10]The court's remarks about the validity of disclaimers of contract estimates (587 F. 2d at 475-476 n.4) thus constitute little more than "dubious dictum," *Webco Lumber, Inc.* v. *United States*, 677 F. 2d 860, 864 (Ct. Cl. 1982), and in any event do not assist petitioner in light of the absence of any evidence that the estimates at issue here could be considered "grossly erroneous" (see Pet. App. A33).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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